No. 07-247

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IN THE

Supreme Court of the United States

STEPHEN M. TREZZA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SUPPLEMENTAL BRIEF FOR PETITIONER

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SUPPLEMENTAL BRIEF

Pursuant to Rule 15(8), Rules of the Supreme Court, Petitioner Stephen M. Trezza (Trezza) files this Supplemental Brief to alert the Court to "intervening matter not available" at the time of Trezza's last filing. Specifically, Trezza calls the Court's attention to the Government's Petition for Certiorari in *United States of America v. Rayburn House Office Building, Room 2113, Washington, D.C. 20515*, No. 07-816. In *Rayburn*, the government takes a position opposite to the position that the government has taken in this appeal.

Rayburn concerns the execution of a search warrant at the congressional office of Representative William J. Jefferson and whether the method by which that warrant was executed violated the Constitution's Speech or Debate Clause. *See* U.S. Const. Art. I, § 6, Cl. 1. Representative Jefferson filed a motion for return of property pursuant to Rule 41(g), Fed. R. Crim. P., requesting return of all seized documents protected by the Speech or Debate Clause. The District Court denied that motion and Representative Jefferson appealed to the D.C. Circuit. Importantly, and in contrast to Trezza's case, no final judgment was entered by the District Court in *Rayburn*. Moreover, while Representative Jefferson's appeal was pending in the D.C. Circuit, Representative Jefferson was indicted in the U.S. District Court for the Eastern District of Virginia. Indeed, Representative Jefferson already filed a motion to suppress based on many of the same issues in his Rule 41(g) motion that is the subject of the government's petition.

On appeal, the D.C. Circuit found that the execution of the search warrant did violate the Speech or Debate Clause and remanded the case to the District Court for a determination of which seized documents fell within the Speech or Debate Clause's scope and, therefore, had to be returned to Representative Jefferson. The government now petitions this Court to review and reverse the D.C. Circuit's decision.

The government's petition for certiorari in *Rayburn* is significant to Trezza's case because, by filing the petition, the government concedes that, despite the fact that Representative Jefferson has been indicted, and despite the fact that no final judgment was entered in *Rayburn* in the District Court, an appeal properly can be brought. The general rule regarding the appealability of denials of Rule 41(g) motions is that such appeals can be maintained only when the Rule 41(g) motion was "solely for the return of the property and is in no way tied to a criminal prosecution *in esse* against the movant." *DiBella v. United States*, 369 U.S. 121, 131-32 (1962). Whether a grand jury investigation qualifies as a "criminal prosecution *in esse*" is one of the core issues of Trezza's appeal. However, it is generally accepted that the return of a criminal indictment, such as against Representative Jefferson, clearly qualifies as a "criminal prosecution *in esse*."

Here, the government admitted that Trezza's case is a civil case. And the government admits that a final civil judgment denying Trezza' Rule 41(g) motion was entered by the District Court. Furthermore, no indictment has been brought against Trezza, despite over two years having elapsed since the execution of the

search warrants at issue in Trezza's case. Despite these facts, the government claims in its Brief in Opposition that Trezza cannot maintain his appeal and the Ninth Circuit correctly determined that it lacked jurisdiction over Trezza's appeal.

The government cannot have it both ways. In *Rayburn*, the government is pursuing an appeal regarding the denial of a Rule 41(g) motion despite a criminal indictment and a lack of a final District Court judgment. With Trezza, the government is arguing that Trezza's appeal is not proper, yet no indictment has been brought against Trezza and a final, civil judgment was entered in the District Court.

Respectfully submitted,

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